Supreme Court, U.S.
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No. 99-1930

In The

Supreme Court of the United States

SCOTT ALBERS,

Petitioner,

vs.

MONTANA SUPREME COURT,

Respondent.

On Petition For Writ Of Certiorari To The Montana Supreme Court

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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ARGUMENT

There is no merit to Respondent's argument that the Petition for Writ of Certiorari herein was untimely. In calculating the date upon which the petition was due to be filed, respondent makes a fundamental error by counting the time from the entry of an interlocutory order, rather than the entry of the judgment of the Montana Supreme Court. Under 28 U.S.C. § 1257 (a), this Court may review "*Final* judgments or decrees rendered by the highest court of a state . . . " (Emphasis added). This Court's Rule 13 likewise provides that "a petition for writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals . . . is timely when it is filed by the Clerk of this Court within 90 days *after the entry of judgment.*" (Emphasis added). The judgment herein imposing discipline upon Petitioner was entered February 18, 2000. App. 91. Petitioner therefore had until May 17, 2000, within which to file his petition for writ of certiorari in this matter. The record reflects that this Petition was filed one day prior to the deadline.

Respondent erroneously characterizes the Montana Supreme Court's published order of January 13, 2000 denying petitioner's motions for discovery and constitutional challenge to Montana's disciplinary proceedings (See App. 1) as a final judgment. Based on this inaccurate assumption, Respondent argues that the time within which to petition this Court for Certiorari commenced February 15, 2000, when the Supreme Court denied a motion for reconsideration of its interlocutory order. See Brief in Opposition, p. 5; App. 86. The Montana Supreme Court's opinion of January 13 makes it very clear that it

was dealing with interlocutory issues, and that its order did not constitute a final judgment in the attorney disciplinary proceedings. At the outset of its opinion, that Montana court stated the limited scope of its ruling:

> In this Opinion, we address only those issues of general import to attorney disciplinary proceedings which were orally argued before the Court. We do not here discuss the Commission's findings, conclusions, and recommendations as to the particulars of the Goldstein or Albers case. The issues which have been raised as to those matters, and *the Court's final determination as to the appropriate discipline, if any, of Goldstein and Albers, will be discussed in separate Orders or Opinions to be issued at a later date.*

App. 2. At the conclusion of its interlocutory opinion, the Montana Supreme Court again reserved resolution of the underlying disciplinary actions for a later day, stating, "We take under further advisement the remaining issues raised in these matters as to the discipline to be imposed, if any, against Morton B. Goldstein and Scott A. Albers." App. 20. Clearly, this order is interlocutory in nature, and is not the "judgment" which triggers the running of the time for filing a Petition for Certiorari in this Court.

The time for filing Albers' Petition herein commenced February 18, 2000, when the Montana Supreme Court entered an order stating, "Pursuant to Rule 9E of the Rules for Lawyer Discipline, this matter is now deemed submitted to this Court for a determination of the appropriate discipline." App. 92. The Court on that date adopted the findings of the Montana Commission on Practice *in toto* and entered its final order that Petitioner be publicly censured and ordered to pay costs. App.

92-93. Clearly, the Order of February 18 is the final order *or judgment contemplated by 28 U.S.C. § 1257(a) and* Rule 13. To hold otherwise would require litigants to petition this Court for certiorari review of interlocutory orders, in spite of the possibility that a subsequent decision by the state court might render the entire proceedings moot. In theory, the Montana Supreme Court could have rejected the Commission's findings *in toto*, and dismissed the complaint against Albers without further action. There is no merit to respondent's argument that the petition herein is out of time.

With respect to the remaining points raised by Respondent, Petitioner respectfully suggests that they are adequately addressed in his opening petition. Since counsel for Respondent who prosecuted the complaint was counsel for, and acted at the direction of, the Commission which entered findings and recommendations, Petition pp. 18-23, App. 46, Respondent's claim that the investigative and adjudicative functions are not combined in a single body (Brief in Opposition, pp. 6-8) is without merit. Since Petitioner was denied discovery of the Commission file and affirmatively prohibited, under threat of contempt of court, to present evidence or even make offers of proof regarding certain matters, Petition pp. 27-28, App. 27, Respondent's argument that Petitioner received "full procedural due process," Brief in Opposition, pp. 9-10, is likewise meritless.

Finally, Petitioner respectfully suggests that the American Bar Association's report of its study of Montana's disciplinary procedures, quoted extensively in the dissenting opinion of Judge James C. Nelson, App. 23-31, underscores the importance of the issues presented in this

case. Further, as pointed out by Amici in support of Albers' Petition, "The issues in this case are of far-reaching importance to the ethical responsibilities of lawyers in criminal cases, to the effective assistance of counsel, and to the due process rights of lawyers and their clients." Motion for Leave to File Brief Amicus Curiae, 11. On the face of this record, a neutral observer could readily conclude that Albers was disciplined for nothing more than zealous and effective advocacy. Any procedure which produces such results without the basic components of due process of law, including an impartial tribunal and opportunity to present evidence in defense, presents this Court with issues of importance to the criminal and civil systems of justice.

CONCLUSION

For the Foregoing reasons, Petitioner prays this Court to issue a Writ of Certiorari to review the judgment of the Montana Supreme Court.

Respectfully submitted,

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